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IN THE

Supreme Court of the United States

No. 839

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

JOSEPH GALLO,
Petitioner.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
STATEMENT	1
ARGUMENT	5
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:

Avery v. Alabama, 308 U. S. 444 (1940)	5, 6
Commonwealth v. Snow, 116 A. 2d 283 (Pa. 1955)	6
Majeske v. United States, 266 F. 2d 947 (9th Cir. 1959)	5, 6
People v. Brabson, 9 N. Y. 2d 173, cert. denied 366 U. S. 978 (1960)	6
People v. Jackson, 111 N. Y. 362 (1888)	5
Torres v. United States, 270 F. 2d 252 (9th Cir. 1959)	5, 6
United States v. Arlen, 252 F. 2d 491 (2d Cir. 1958)	5, 6
United States v. Terranova, 309 F. 2d 365 (2d Cir. 1962)	10

Statutes:

Penal Law of New York	
Section 2	1
Section 580-a	1
Section 850	1
Section 851	1
New York Code of Criminal Procedure	
Section 347	4, 8

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Statement

The petitioner, Joseph Gallo, was convicted of conspiracy and attempted extortion (34-5).* [Penal Law of New York, §§2, 580-a, 850, 851]. The uncontroverted evidence established that Gallo, scheming with others, attempted to force Theodore Moss to make him a "partner" to his business ventures by singularly explicit and frequently reiterated threats that Gallo would cause Moss to meet with an "accident" involving serious physical injury if he declined the proposal. To reinforce his threats, he had Moss brought to an empty back room of a cafeteria where he beat him. Gallo's conviction was unanimously affirmed by the New York Supreme Court, Appellate Divi-

* References, unless otherwise indicated, are to folios of the printed record below.

sion, First Department, and leave to appeal to the New York Court of Appeals was denied by Chief Judge Charles S. Desmond.

Since the petitioner contends that he was deprived of due process by the court's refusal to grant an adjournment, a review of the events preceding trial is necessary.

The petitioner was indicted, together with several other defendants, on May 26, 1961. On June 2, 1961, Messrs. Price & Iovine filed a notice of appearance on behalf of Gallo, and on June 6, 1961, Gallo, represented by Mr. Iovine, pleaded not guilty (29, 30). On June 21st the case was called. The People were ready for trial but an attorney for one of the other defendants informed the court that Messrs. Price & Iovine were engaged in another trial and would be so engaged for some time (81). The district attorney stated that if an adjournment was necessary because Messrs. Price & Iovine were unavailable, he would like the case t ogo to trial as soon as they were free (81-5). The trial was set for August 7, 1961 (87).

On August 7, 1961, the district attorney again stated that the People were ready for trial, that the trial would take no more than three days, and that because of the nature of the case, it was particularly desirable that it be tried promptly (102-3). Mr. Weiswasser, an associate of Messrs. Price & Iovine, stated that Mr. Price had taken a vacation at the doctor's orders and would be gone for at least two or three weeks. He asked that the case be set down for September (103-4). The court set August 30th for the purpose of fixing a definite trial date (111).

On August 30, 1961, the court set October 23, 1961, as the trial date. Mr. Weiswasser, representing Gallo on behalf of Messrs. Iovine & Price, voiced no objection. At the time it was unclear as to which of two counsel represented Anthony Leone, another defendant, and the court admonished counsel:

> I wouldn't want any doubt to exist on the 23rd as to who represents Leone; and I don't want an application for an adjournment on that ground. That must be straightened out long before October 23.
>
> * * *
>
> This is now August and there is plenty of time and there will be no excuse (124-5).

On October 23rd Mr. Iovine again requested an adjournment. He informed the court that Mr. Price was engaged in numerous other matters and also that he wished to bring a motion for change of venue because the Gallo brothers had received considerable publicity in the newspapers (143-7). Although the allegedly adverse publicity began May 12th, and what was claimed to be particularly adverse publicity began August 20th (180-3), over two months earlier, the court adjourned the case for another week. The court stated, however, that he wished it understood that any motions for change of venue were to be made during that week and that he hoped that Mr. Price would be free to proceed to trial on the 30th (161, 164-5).

On October 30th, when the district attorney again indicated he was ready to proceed to trial (174-5), Mr. Weiswasser moved for a further adjournment on the ground that the motion for a change of venue was pending before

the Appellate Division (175-6). Adjourning the trial again, the court gave the defendant till 2:30 p.m. that afternoon to make an application for a stay before a justice of the Appellate Division pursuant to section 347 of the New York Code of Criminal Procedure (192). At that point Mr. Weiswasser added that Mr. Price was ill and that he did not know when he would be well enough to try the case (192-3).

The application for a stay was denied by a judge of the Appellate Division on October 31st (201). Mr. Weiswasser thereupon again informed the court that Mr. Price was ill, stating that the doctor had ordered him to take at least a month's vacation and that he would not return from Florida before December 4th (201-3, 215-6). The court adjourned the case to November 6th (242), instructing the defendant to appear with other counsel and admonishing him that it would not tolerate any further delay (228-9).

On November 3rd the court called the defendant in to inquire whether he had obtained an attorney (251). When informed that he had not, the court assigned Irving Mendelson, Esq., and Robert Weiswasser, Esq., to represent the defendant (259-63). The court stated that it expected the case to proceed to trial on Monday, November 6th (270).

On November 6th, Mr. Mendelson informed the court that the defendant refused to confer with him and that Mr. Weiswasser declined to help (342-8). At Mr. Mendelson's request, one juror was picked and the case adjourned to November 14th to give Mr. Mendelson additional time to prepare the defense (397-402).

On November 14th both defense counsel stated that they would remain mute throughout the proceedings. Mr. Mendelson stated that he had attempted several times to confer with the petitioner, but his attempts had met with insult and rebuke. Mr. Weiswasser took the position that whatever he knew about the case he knew in his capacity as an associate of Messrs. Price & Iovine; that Gallo refused to talk to him in his individual capacity as assigned counsel; and that therefore he could not assist Mr. Mendelson or otherwise participate in the trial. The court relieved assigned counsel, instructing the petitioner that the effect of his refusal to avail himself of their services was that he would be representing himself (423-9, 433-5, 450-70). The petitioner chose to remain mute throughout the trial (566, 588, 607, 631, 668, 677, 689, 695, 703, 840, 943, 960, 962, 965; 1036, 1096).

In the course of these adjournments, Moss, who was to be the chief witness against the petitioner, was approached by several persons to retract his testimony. Ten detectives were employed by the city to protect him (287).

Argument

Traditionally, the disposition of a request for an adjournment is within the sound discretion of the trial judge and will not be disturbed on appeal in the absence of a clear abuse of discretion. *Avery v. Alabama*, 308 U. S. 444 (1940); *People v. Jackson*, 111 N. Y. 362 (1888); *Torres v. United States*, 270 F. 2d 252 (9th Cir. 1959); *Majeske v. United States*, 266 F. 2d 947 (9th Cir. 1959); *United States v. Arlen*, 252 F. 2d 491 (2d Cir. 1958). The right to coun-

sel, vital though it is, does not imply the right to indefinite delay to select, await, or prepare a lawyer for trial." *Avery* v. *Alabama*, *supra*, 308 U. S. 444; *People* v. *Brabson*, 9 N. Y. 2d 173, cert. denied 366 U. S. 978 (1960); *Commonwealth* v. *Snow*, 116 A. 2d 283 (Pa. 1955); *Torres* v. *United States*, *supra*, 270 F. 2d 252; *Majeske* v. *United States*, *supra*, 266 F. 2d 947; *United States* v. *Arlen*, *supra*, 252 F. 2d 491. As stated by the Court of Appeals for the Second Circuit in *United States* v. *Arlen*:

> Although the right to assistance of counsel is absolute [citations omitted], the exercise of that right is subject to the necessities of sound judicial administration. * * * We think it clear that although a defendant able to retain counsel is entitled to a reasonable time to secure counsel, he may not indefinitely postpone trial by continued applications for more time to seek representation. Whether additional time should be granted is within the sound discretion of the trial court.
>
> * * *
>
> * * * The orderly administration of justice does not permit unlimited delays in order that a defendant may secure counsel. It is also of public importance that defendants be tried while those whom they have allegedly defrauded are still alive to tell about it (252 F. 2d 491, 494-5).

In *People* v. *Brabson*, the New York Court of Appeals stated:

> A defendant has no *right* to delay his trial unreasonably regardless of reality, nor do we construe the law as giving him the *power* to do so. 9 N. Y. 2d 173, 179.

In the instant case, far from abusing its discretion, the trial court manifested extreme patience, granting several adjournments for a period of over four months to give the petitioner's counsel every opportunity to appear, adjourning again to permit the petitioner to retain other counsel, and adjourning again to give assigned counsel ample time to prepare the case.

The petitioner, who had a record of numerous prior arrests and several prior convictions (1156-9), was charged with a serious crime. He had beaten Moss and threatened him with grave physical injury. His bail was set at $100,000 (31). In addition, Moss had been approached by several persons to retract his testimony (287). Having caused Gallo's arrest, having been beaten and threatened by Gallo before his arrest, and having been approached to retract his testimony after Gallo's arrest, Moss was understandably nervous and frightened. Ten detectives were employed (at considerable cost to the City) to provide him with twenty-four-hour protective custody, but even so, he wanted to run (287).

Despite these considerations, which rendered a prompt trial vital, the trial court granted the petitioner's requests for adjournments over a period of close to five months. The court adjourned the case on June 21 because Mr. Price was engaged in another trial (81). The court adjourned the case on August 7th, again at the request of an associate of Mr. Price's who stated that Mr. Price was ill, had taken a vacation at the doctor's orders, and would not return for several weeks (103-4). On each of those occasions the district attorney indicated that the People were ready

and particularly anxious to try the case promptly (85, 102-3). On October 23rd, which had been set as the definite trial date, the court was again told that Mr. Price was engaged in other matters. A continuance was also requested on the ground that the petitioner wished to make a motion for change of venue (143-6). Even though adverse publicity was alleged to have begun May 12th, and the publicity on which the motion was to be premised was alleged to have begun August 20th (180-3), over two months before the trial date, defense counsel waited till the actual date of trial without making the motion. Nonetheless, the court granted a further adjournment for a week to permit counsel to move for a change of venue. On October 30th, the petitioner again asked the court to postpone trial, on the ground that the motion for change of venue was pending before the Appellate Division. Although defense counsel could have made an application for a stay pursuant to Section 347 of the New York Code of Criminal Procedure simultaneously with the motion for change of venue, he failed to do so. The court again adjourned the case to permit a judge of the Appellate Division, which was considering the motion for a change of venue, to determine whether the motion had sufficient merit to warrant a stay of the trial (185-92). The application for a stay was denied on October 31 by a judge of that court. Thereupon, Mr. Weiswasser informed the court that Mr. Price was ill again and would not return from Florida before December 4th (192-5, 201-3, 215-16).

Mr. Price's affidavit reveals that he sold his home in New York, bought a home in Florida, and moved to Florida on October 26th (71-2). Although this must have entailed

considerable advance preparation, the court was not informed of these plans despite the fact that the trial had been definitely set for October 23rd. Even on October 23rd, when Mr. Iovine requested a further adjournment, he stated that it was impossible for Mr. Price to try the case at the time because he was engaged in numerous other proceedings (143-4), never intimating that Mr. Price was leaving New York in three days. Nor was Mr. Price's imminent departure called to the court's attention when the court adjourned the case to October 30th and specifically stated that it hoped Mr. Price would be there to try it on that date (164).

By October 31st, when the court was informed that Mr. Price would not be back before December 4th, it had already adjourned the case, at his request, four times—June 21st, August 7th, October 23rd, and October 30th—and for more than four months. Moreover, defense counsel was a man of 73 years, ill and in semi-retirement. He stated in his affidavit that he was physically not able to return to New York at the time and would "not be fit to do so until after December 4th" (71-2). There was, of course, no assurance that he would be able to do so on or immediately after December 4th.

In view of the circumstances of this case, the number of adjournments already given, the cavalier treatment of the court by defense counsel, and the advancing years and ill health of Mr. Price, it was not an abuse of discretion for the court to deny a further five weeks' adjournment in the hope that counsel would then be well, unburdened by other engagements, and willing to try this case. The court

did adjourn the case for one week to permit the petitioner to obtain other counsel. Moreover, when the petitioner failed to do so, the court assigned Irving Mendelson, Esq., a skilled criminal lawyer of 38 years' experience, and Robert Weiswasser, Esq., an associate of Mr. Price familiar with the case, to represent him, and gave them from November 3rd to the 14th to prepare the case.

The record is clear that the reason assigned counsel did not represent the petitioner was not lack of time to prepare, as stated in the petition for certiorari (p. 9), but, in the case of Mr. Mendelson, because the petitioner refused to talk to him, and, in the case of Mr. Weiswasser, because he had been so instructed by Mr. Price. Both counsel stated that Gallo told them he did not wish them to represent him (342-8, 425-9, 450-70).

Having elected not to retain other counsel when the lawyer whom he initially retained remained unavailable over a period of five months, and not to accept the services of assigned counsel, the petitioner cannot now claim that he was deprived of his right to counsel. As was stated by the court in *United States* v. *Terranova*, 309 F. 2d 365, 366 (2d Cir. 1962), where the defendant also directed counsel to remain mute, "He cannot manipulate that right so as to interfere with the fair administration of justice."

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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